STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JUNE 14, 2023

IN THE MATTER OF:
Appeal Board No. 628446

PRESENT: GERALDINE A. REILLY, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective July 14, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by CITIZENS OPTIONS UNLIMITED prior to July 14, 2022 cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant and the employer. By decision filed February 28, 2023 (), the Administrative Law Judge sustained the initial determination.

The claimant appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statements submitted on behalf of the claimant and the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant worked for the employer for more than 13 years, through July 14, 2022, as a case worker at an agency that provides services to the developmentally disabled. The employer's handbook does not state that an employee taking family leave must be in the same physical location as the person being taken care of.

The claimant's 19-year-old daughter has mental health issues for which she has

been under treatment by her primary doctor and a psychotherapist since 2020. The claimant was on Paid Family Leave ("PFL") to care for her daughter from May 18, 2020 through approximately July 13, 2020. From June 19, 2020 through July 21, 2020, the claimant's daughter was attending a therapeutic program in Oklahoma. The claimant drove her daughter to Oklahoma to drop her off and intended that her daughter would stay in the program for a year. Upon returning to New York, the claimant was subject to COVID quarantine based on the governor's order for travelers from certain states. The claimant informed the employer that her daughter was in a program in Oklahoma.

The claimant contacted the employer and was told not to return to work until she got the results of her COVID PCR test. The claimant remained on PFL while she was in New York and her daughter was in Oklahoma. In July, she returned to work on the first day she was eligible. Her daughter was still in Oklahoma when the claimant returned to work.

During the period the claimant's daughter was in the program in Oklahoma, the claimant did not speak directly with her daughter, but instead spoke only with personnel from the program. The claimant was not permitted to visit her daughter. She spoke with the program several times. After a month, the program staff called the claimant and had the claimant pick her daughter up because her daughter was not complying with the program. The claimant was no longer on PFL when she went back to Oklahoma to get her daughter.

On August 30, 2021, the claimant filed a federal lawsuit against the employer contending that she was not paid properly. On September 29, 2021, the claimant's supervisor issued a write-up to the claimant for abusing her paid time off and suggested that the claimant look into the leave options available to her.

By January 2022, the claimant's daughter was living with the claimant's sister in Washington state. The claimant contacted the employer's benefits person on January 14, 2022. The employer gave the claimant an unpaid 30-day leave of absence from January 18 through February 18, 2022 to submit her FMLA and PFL paperwork and get it approved. While her FMLA/PFL leave was not yet approved, the claimant did not leave for Washington. The claimant's FMLA paperwork said she would be assisting her daughter with activities of daily living, transportation, and emotional comfort. The employer's insurance carrier required the claimant to provide information from her daughter's healthcare providers. The claimant also did not go to Washington immediately upon

starting her leave because, in addition to supporting her daughter, she was dealing with her father's health issues, as she was her father's healthcare agent, but her reason for taking PFL did not include her father's health issues.

By letter dated January 31, 2022, the employer's insurer asked the claimant to confirm where she would be physically located while providing care to her family member and provide basic details on the type of care she would be providing for her family member. For her location, the claimant provided her home address

on Long Island as well as her sister's address in Washington. With respect to the details of care, the claimant wrote a letter in which she identified herself as the primary caregiver for her daughter and stated that her daughter was currently living with a relative in Washington state. Her letter also reported that her daughter still needed the claimant's support as a parent, and the claimant needed to ensure the proper coordination of matters including her daughter's medical appointments, health insurance, and transportation, as well as support with financial obligations and receiving and accessing appropriate programs and services. The claimant expressed her intention to go to Washington in addition to supporting her daughter from New York. The claimant also stated that she was on standby as the healthcare agent for her father. In conversations with the employer's benefits department, the claimant explained the same things that she reported in her letter to the insurance carrier.

While the claimant was in New York, the claimant talked her daughter through situations to encourage her to engage in personal care and activities of daily living and take her medication. At times, due to the time difference, the claimant was woken at 2:00 in the morning to deal with these situations. During the day, the claimant would spend hours on the phone calling her daughter's providers and helping her daughter get up and out of bed. The claimant also worked to coordinate her daughter's transportation in Washington.

The claimant started receiving PFL payments from the employer's insurer on or about February 4, 2022, when she was paid $2,289.78 for the period from January 19, 2022 through February 8, 2022. In mid-February 2022, the claimant understood that she was approved for leave, and she arranged to take the first available flight that she could manage with everything else she had to get done. The claimant was on PFL from January 18, 2022 to March 26, 2022. In

total, the claimant received more than $7,000.00 in PFL payments from the employer's insurer for the period from January 19, 2022 through March 24, 2022.

The claimant went to Washington State on February 28. While in Washington, the claimant provided support to her daughter in choosing to engage in activities including hygiene, meal preparation, and medication compliance. The claimant returned to work in New York on March 28 or 29. Her daughter came back a few days later. The claimant continued working with no further leave time through her last day of work on July 14.

A deposition of the claimant in her lawsuit against the employer was held on June 16, 2022. In that deposition, the employer learned for the first time that the claimant was not with her daughter during periods when she was on leave as her daughter's primary caregiver. In response, the employer discharged the claimant for fraudulent use of leave time.

OPINION: The credible evidence establishes that the employer discharged the claimant because the employer believed the claimant misused her leave time and obtained her PFL and FMLA leave fraudulently. Significantly,

however, the employer has provided no evidence that the claimant was ever informed of any rules that she would be subject to with respect to her use of PFL or FMLA. Further, the employer has not produced the actual statements that the employer contends were fraudulent. The only evidence of any statement by the claimant to the employer is contained in the deposition transcript, where the claimant testified that her FMLA paperwork indicated that she would be assisting her daughter with activities of daily living, transportation, and emotional comfort. We are not persuaded that this representation by the claimant was fraudulent. In this regard, the claimant was actively involved in coaxing her daughter by telephone to engage in activities of daily living including getting up, showering and other personal hygiene, and taking medication. The claimant also arranged her daughter's transportation by telephone and provided personal comfort by telephone. The employer contends that providing these types of assistance by phone is not consistent with the requirements of New York's PFL regulations, but the employer has not shown that the claimant knew or had any way of knowing that PFL was available only to workers providing care to a family member with whom they were physically present. We also are not persuaded by the employer's contention that the claimant's letter to the employer's insurer was fabricated. The employer has not produced any other document that the employer contends was actually

submitted to the insurer and also has not shown how this other document, if it exists, was fraudulent toward either the insurer or the employer.

The cases that the employer cites on appeal do not support a finding of fraud in the present case. In Appeal Board No. 601578, the claimant told her employer that she needed to take her son to a doctor's appointment in Brooklyn. In fact, the claimant went to Cuba. No interpretation of the claimant's statement to the employer could encompass what she actually did. In Appeal Board No. 574649, the claimant was aware of the employer's policy that prohibited falsifying or lying about sick or personal leave or a leave of absence. Nevertheless, the claimant told the employer he was in the hospital, after previously saying he was up all night arguing. When the employer told him to bring in documentation of his hospital visit, he was unable to do so, and instead brought in a note from his own doctor. Again, the record in that case established what the claimant said, that the claimant's statement was false, and that the claimant knew he was breaking a rule.

Instead of providing the claimant's actual statements that the employer alleges were fraudulent, the employer has submitted inconclusive evidence including photographs of the claimant's daughter on occasions including her birthday. Even if we accept that these photographs show that the claimant's daughter was capable of caring for herself sometimes, they do not establish that her daughter was capable of doing so on an ongoing and consistent basis or that the claimant was not actively engaged in assisting her daughter. Finally, to the extent that the employer alleges that the claimant engaged in other improper actions, those contentions are beyond the scope of this proceeding and will not be considered. Accordingly, we conclude that the claimant's actions do not rise to the level of misconduct. Accordingly, her employment ended under non-disqualifying circumstances, and the claimant is allowed benefits.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective July 14, 2022, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to July 14,
2022 cannot be used toward the establishment of a claim for benefits, is overruled.

The claimant is allowed benefits with respect to the issues decided herein.

GERALDINE A. REILLY, MEMBER